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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

JOSEPH TAIBE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

October Term 1978

No.

JOSEPH TAIBE,

Petitioner

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner, JOSEPH TAIBE, respectfully prays that this Court issue a writ of certiorari to review the Judgment and Order of the United States Court of Appeals for the Second Circuit, rendered on November 2, 1978, which affirmed petitioner's conviction for Possession of Cocaine with intent to distribute, in violation of 21 United States Code, Section 841 (a)(1).

Petitioner was convicted after a jury trial in the United States District Court for the Eastern District of New York. The Court previously denied petitioner's suppression motion, after a hearing, in a 19-page opinion (446 F.Supp. 1142).

On June 16, 1978, Hon. Mark A. Costantino sentenced petitioner to five years in prison, plus a special parole term of ten years and a fine of $5,000.00.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28 U.S.C., Section 1251. No opinion was written by the Court of Appeals.

QUESTIONS PRESENTED

1. Whether when the initial stop and frisk turns up nothing suspicious, but rather it indicates everything is in order, the atents have a right to investigate or search further.

2. What the limitations are concerning the rights of agents in conducting stop and frisks in automobile situations.

3. Whether it is ever possible to obtain the consent of a person to be search when agents have drawn their revolvers.

4. A more precise clarification with regard to the burdens imposed upon the government in consent search situations; whether the burden can be met simply by the mere statement of an agent that the defendant consented to the search.

5. Whether the law of the United States recognizes the inevitable discovery theory, concerning which various Circuit disagree or have expressed doubt; the specific guidelines for the application of such doctrine if recognized.

6. Whether possession of cocaine by a person under circumstances indicating the possession for personal use can ever constitute a Federal crime.

STATUTE

21 U.S.C. Section 841 Prohitited Acts A- Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance ...

Penalties

(b) Except as otherwise provided in Section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in Schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000., or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000., or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such prior conviction, impose a special parole term of at least 3 years, in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

FACTS

THE SUPPRESSION HEARING

The major issue in this case involved actions of representatives of the Drug Enforcement Agency in conducting a search in the vicinity of Kennedy Airport. Petitioner moved to suppress a very small quantity of cocaine which was found in his jacket as well as other items taken from a suitacase and the Court conducted a full-fledged suppression hearing.

After the hearing, all parties submitted memoranda and the Court denied the motion, partly on the "eventual discovery" theory and partly on the basis of petitioner's

consent to search and for the other reasons contained in the Court's 19-page opinion. (Appended hereto).

The first witness was agent JOHN HUBER, who said that on August 24, 1977 he read the log entry at the DEA office at Kennedy Airport. The communication advised that petitioner was on a United Airlines flight scheduled to arrive at Kennedy at 4:30 and that he was in possession of approximately $30,000.00 in cash and travelling with a ticket issued to one, John Melli. Taibe has been coming from Alaska by way of Seattle and had a preboarding examination in Seattle when the authorities there discovered the cash; Taibe had advised them that he had earned the money working on the Alaskan Pipeline construction. The report also indicated that petitioner had been a suspected cocaine dealer on the Alaskan Pipeline. (However, the actual report showed that the deals Taibe was suspected of engaging in occurred approximately a year before.)

The witness, along with Agents SEARS and MIRANDA, instituted the surveillance. The flight arrived about 5:00 P.M. and a man fitting Taibe's description walked towards the baggage area.

Taibe met a friend, later identified as one, MICHAEL TULLO, and appeared to give him his baggage claim

ticket. Both men went down separate escalators to the baggage area where Tullo waited for the baggage and picked up a soft-sided suitcase from the baggage carousel but Taibe had proceeded directly to the parking lot. Tullo then went into the parking lot and both men were observed walking separately but in the same general direction where they met at Michael Tullo's automobile. Tullo placed the suitcase on the back seat, both men entered the car, petitioner on the passenger's side, as they apparently were beginning to leave. The three agents then approached the car and requested that the two men exit the vehicle. There was no response, so the agents shouted and repeated their order. There was still no response for about thirty seconds, but then the men got out of the car.

Miranda was on the driver's side and Sears was on the passenger's side. Agent Huber walked over to Tullo, asked for identification and Tullo identified himself. He then searched Tullo for weapons and found none. Huber then went back to Taibe's side and asked for identification, which caused Taibe to produce his driver's license. He also asked Taibe if the baggage picked up was his and Taibe said it was. Huber said he got Taibe's consent to search the baggage and at that time he did not know what it contained. Huber reached into the rear of the car and

brought a valise to the front seat. He also picked up the jacket which Taibe had brought to the car and was now in the front seat and concealed. Agent Sears had told him that he had seen Taibe try to push it under the front seat. As the witness picked up the jacket a bag containing white powder fell out of the left-hand pocket, if fell on the front seat and then remained on the sill of the front of the car. Taibe said he did not know what it contained. Huber then took the suitcase to the rear of the vehicle, opened it and found a brown paper bag which contained a clear plastic bag of white powder which turned out to be lactose.

There was also a box which contained a narcotics dector kit which was a kit to test and identify cocaine. Humber then told Agent Sears to advise both men of their rights. Huber then retrieved the packet that had fallen from petitioner's jacket. Huber then requested Taibe to come back to the office and petitioner said he would. At the DEA office at Kennedy Airport a field test was taken of the packet found and it was cocaine. Huber then telephoned the Assustant United States Attorney, after which he arrested both Taibe and Tullo, and told Sears to again advise both of their rights.

Huber then asked Taibe for permission to look through

his suitcase and petitioner gave his consent. He then found two other items concealed in the suitcase, a razor blade, mirror and a hollow tube. Also, $40,000.00 was found in the lining of Taibe's jacket and Taibe said he earned it working on the Alaskan Pipeline.

On cross examination, Huber said that neither he nor any of the other agents had their weapons out. The windows were closed, the car engine was not running and the witness ordered Taibe to get out of the car. When the man hesitated, he shouted and both petitioner and Tullo were placed against the car with their hands on top of the automobile and they were searched. The agent said that he did not apply any pressure nor make any threats to obtain petitioner's consent to search the valise. However, he did not obtain petitioner's signature on a consent form, allegedly because he did not have any forms with him. He also said that even though the windows were closed, the occupants of the car were able to hear.

The next witness was Agent Sears and he gave similar testimony regarding information from Seattle and his surveillance of petitioner and Tullo, from the time that Tullo got the baggage to when they both entered the car. Sears confirmed that the agents ordered petitioner to get out of the car. But, contrary to Huber, he admitted

that when petitioner hesitated, he drew his service revolver. Sears said he tried to open the door but upon discovering it was locked he banged on the window and again ordered Taibe out of the car. Sears put his gun away and took petitioner to the rear of the car where petitioner was made to place his hands on the vehicle and he was searched. Petitioner was asked for identification and he produced a driver's license. At that time he advised Taibe of his rights. Sears saw the suitcase on the back seat and he also saw petitioner trying to push his jacket under the front seat. He said that he told Huber of that fact.

Agent Sears was confronted with the log entry made at the DEA office which indicated that Huber picked up the jacket from the front seat of the car to get at the baggage which was also on the front seat. Sears said that the report was incorrect and anyone in the office could have made that erroneous entry. He swore that the valise was on the rear seat. Of course, they did not obtain the consent form from Taibe nor did they ever ask him to sign any such forms.

The third agent was Agent MIRANDA and after he gave similar testimony about the surveillance from the baggage area to the parking lot, his testimony then differed

substantially. He said that the car engine was running and that all three agents had their guns out when they approached the car. He ordered Tullo to shut off the engine and they ordered both occupants to put their hands on the car and not to move. When he could not open the dirver's door he ordered the occupants out of the car with their hands up. He saw Huber take the suitcase from the back seat of the car and the brown jacket from the floor area of the front seat. He said he was not sure, but he thought Agent Huber asked Tullo for permission to get the suitcase. On redirect he said that he drew his weapon when he approached the vehicle because one of Tullo's hands was not on the sterring wheel. Then Agent Huber was recalled for a moment and he said that the reason he picked up the brown jacket from the front seat of the car was because it was raining and he wanted to give the jacket to Mr. Taibe to put on. Mr. Tullo testified that petitioner was a friend of his for twenty-two years. He picked Taibe up and both men entered Tullo's automobile. He said that he did not give anyone permission to enter his car. He also said that the engine was not running and that all three agents had their guns out as they approached the vehicle. In fact, two hours later, at the DEA office, when Huber asked for permission to search the car, Tullo

refused and said he wanted to talk to his attorney. He reiterated that all three agents had their guns drawn. He produced identification when requested by Miranda, and he never gave anyone permission to enter the car to take out the suitcase or the jacket.

Petitioner testified that he was seated in the automobile with the door locked when all three agents approached with their guns drawn and ordered them out of the car with their hands up. It was only after the agents shouted and ordered them out of the car that they complied. Taibe said that the cocaine was wrapped in a handkerchief in a knot and that it was in his jacket. The pocket that contained the cocaine was ripped so that he could hide the handkerchief and the money in the lining of the coat.

Huber did not ask him for permission to search either the car or the suitcase, and his rights were read to him only after the search had been conducted when he was told by Agent Sears that he was under arrest. At the DEA office he was again asked for permission to open the suitcase and he again refused. The suitcase belonged to Taibe and his jacket was on the console and not the floor and nothing fell out of his jacket. The agent simply looked into it and extracted the cocaine.

The Court thereafter denied the motion to suppress and read a written opinion which is reprinted herein.

THE TRIAL

The trial began on April 19, 1978. The first witness was John Huber, and he testified about the surveillance of Taibe when he exited from the United Airlines flight until he reached Tullo's car in the parking lot. His testimony was basically the same as he had given at the suppression hearing. He testified this time that they had to sout at Taibe three times before they got out of the car and he said that Taibe consented that he look into the suitcase. He moved a brown jacket in order to get to the suitcase but he had prior information from Sears that Taibe had tried to stuff it under the seat. He picked up the jacket from the collar and lo and behold a handkerchief with a plastic bag containing white powder fell out and on to the seat of the car. He did not examine the powder at the time but instead put the suitcase on the trunk of the car where he searched it and found the plastic bag containing lactose and a narcotics detector kit. Back at the DEA office they got authorization to make the arrest and they asked Taibe if they could search the suitcase again and Taibe voluntarily agreed. Another test kit was found and the similar parts

of narcotic paraphenalia. At that time they also found the $42,000.00 and a round trip airline ticket made out to a Mr. John Melli. Taibe explained that he lived in Alaska, worked on the pipeline and that the $42,000.00 was the product of those efforts. Agent Huber averred that he did not have his gun out and he did not see any of the other agents have their weapons out. He was absolutely sure that he never drew his revolver.

Agent Sears was next to him on his left and he never saw Sears with his gun out. He also never saw Agent Miranda with his gun out. The witness admitted that he ordered the men out of the car three times, whereas at the suppression hearing he testified that he ordered them out two times. He also admitted that nothing he found in the suitcase constituted a federal crime. And, in fact, if the cocaine had not ultimately been found, there would have been no federal crime.

Agent Huber acknowledged that there was a hole in the pocket of the jacket which led to the lining of the coat, yet he maintained that the package fell from that pocket while he was moving the coat. When the packet fell, the witness said that he did not touch it but went to the back of the car to examine the suitcase. It was only after he searched the valise that he went back to the

car to examine the packet. He denied the fact that the suitcase was lying on the front seat under the jacket, but he admitted that he had told someone that it was on the front seat because it was reflected in one of the DEA reports. Huber also said the reason he picked up the jacket was because there was a light rain and he intended to give it to Taibe to cover himself with. Of course, he never gave it to Taibe and the reason he gave was because he did not want to give evidence back to the defendant. Of course, the witness did not know it was evidence at that time because Taibe had said he did not know what was in the packet. He admitted he did not examine it until after he looked into the suitcase.

Agent Robert K. Sears testified about the surveillance and the events leading up to the confrontation at the automobile.

He said ehat he had his shield out when he approached the car. He saw Taibe try to secret the jacket under the seat of the front of the car. He also recalled banging on the window drawing his service revolver and ordering the occupants out of the car. He heard Taibe consent to Huber's searching the baggage and he saw something fall out of the jacket and Huber went to the rear

of the car with the suitcase. Sears was then qualified as an expert over defense objections. He talked about his many purchases of cocaine and he said that the value of the ounce of cocaine was approximately $1,500.00. He discussed the use of lactose and explained the method of diluting and cutting so the narcotics could be sold in greater quantity. On cross examination the witness was now not sure whether Miranda had his gun out but he was sure that Huber had not. He tried to open the door but could not and said that he only had his gun by his thigh when he ordered Taibe out of the car. He made Taibe put his hands on the car and frisked him for weapons but nothing was found. It was after that frisk that Huber went and got the suitcase and that the object fell from the jacket. The witness said that neither agent picked up the packet of cocaine until after they examined the suitcase and the witness acknowledged that at that point no violation of federal law had occurred. Sears denied putting into the DEA report the fact that the suitcase was on the front seat, even though Sears' name was on the report and he said that any one of twenty agents could have made that entry. The cocaine in this case was cut at least five times which brought it down to at least fifteen percent purity and which was about the lowest street level normally found. (Incidentally, the report

in this case showed the total net worth to be forty grams which was less than two ounces.) The witness agreed that a person coming from Alaska to New York with $40,000.00 and test equipment was probably coming in to purchase cocaine to bring back to Alaska rather than to sell it in New York because if the purity was fifteen percent it could not really be diluted further. This was especially true since in the officer's experience most of the cocaine in New York came in from South America or Miami.

A stipulation was then entered into regarding the test of the cocaine's purity was approximately fifteen percent. The substance inthe suitcase was lactose.

The defense called Agent Miranda as its next witness and he recalled that when the confrontation at the car took place, he had his gun out, Sears had his weapon out and he also said he saw Huber with his gun out. He also remembered seeing Huber go into the car and extract the suitcase and a coat.

In summation the defense argued basically that the cocaine was for the defendant's personal use since it could not be cut further, so that there would be no reason to purchase it for resale. In addition, the laboratory reports showed that the cocaine contained

other cutting agents than lactose, to wit: lidocaine and inositol, so it was reasonable to believe that the cocaine had nothing to do with the materials found in the suitcase, nor was it necessarily Taibe's.

POINT I

THE DETENTION OF THE PETITIONER WAS ILLEGAL. ANY ATTEMPTED CONSENT TO A SUBSEQUENT SEARCH MUST FALL.

Petitioner in this Point does not discuss the question of whether there was a valid and legal consent in this case, even assuming that petitioner did, in fact, consent to the search. That question is discussed in Point II, as well as the issue of whether there can ever be a valid consent obtained at gunpoint. The Trial Court held, after a hearing, that the initial detention of the petitioner was not unreasonable, nor was the original stop an unreasonable seizure of his person. We believe that that aspect of the Court's decision was in error, and since any question of consent must flow from the result of the legality of the initial stop, that issue should be discussed first. The Courts have made clear that the government cannot profit from its illegal use of improper actions, and illegal conduct by government officers will give rise to excluding the products of such illegal con-

duct, as well as information and other materials it leads an officer to. United States v. Calandra, 414 U.S. 338 (1974); Wong Sun v. United States, 371 U.S. 471 (1963); United States v. Coplon, 185 F.2d 629 (2nd Cir. 1950), cert. den. 372 U.S. 920; Murphy v. Waterfront Commission of New York, 378 U.S. 52 (1964). In this case, the decision of the Trial Court did not rest on probable cause to arrest petitioner or conduct a search. It could not have rested on such a claim because the information possessed by the D.E.A. agents,that Taibe had dealt in narcotics, was stale, since the dealing occurred approximately a year before and Taibe had done nothing illegal or improper which warranted an arrest or search at the time the agents accosted him at his friend's car.

Indeed, the Trial Court relied on Terry v. Ohio, 392 U.S. 1 (1968); United States v. Oates, 560 F.2d 45 (2nd Cir. 1977); Adams v. Williams, 407 U.S. 143 (1972); United States v. Magda, 547 F.2d 756 (2nd Cir. 1976) and similar cases, to justify the investigative stop engaged in by the D.E.A. agents rather than an arrest and search. In other words, the Court held that the actions of the agents in this case amounted to a brief detention for investigative purposes, as authorized by these cases, and the Court held that the request for personal identifi-

cation also was a minimal intrusion, and a pat-down search for weapons was permissible because the agents had reason to believe petitioner was armed and dangerous. The Court could not have been in greater error as far as the facts are concerned, and it greatly misinterpreted the extent to which people can be detained and intrusions made as authorized by the authorities relied on.

The Terry case and the other authorities referred to were stop and frisk cases and clearly do not support the governmental action found in the case at bar. In Terry, only a pat-down for weapons was involved. This Court pointed out that there was no interference with liberty and that the pat-down was quick and did not involve the officer placing his hands under the defendant's outer garments. Of course, the officer had a right to ask for identification, but the case authorizes the quick frisk for weapons in order to protect the safety of the police officer. This Court pointed out that the search was slight and its only purpose was protective. It was when that pat-down led to the finding of other contraband or products which gave rise to probable cause, that a search thereafter ensued, and the product that was obtained was justified. The facts are similar in Oates and Magda, where the searches were quick and the pat-downs were for protective purposes and no interference to speak of was involved. In

this case, where there is a search of a person with his hands raised against a wall or on top of a car, the intrusion cannot be minimal.

In Terry, this Court recognized the great indignity attendant to that type of search. This Court said:

> "Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity'. It is a serious intrusion upon the sanctity of the person, ... and it is not to be undertaken lightly."

Terry v. Ohio, supra, at pages 16-17.

In Terry and the other cases, the pat-down led to the finding of a weapon or other contraband. In the case at bar, even assuming that ordering petitioner out of the car at gunpoint was proper, and searching him with his hands on top of the car was only a pat-down, the officers found nothing. The officers also asked for identification and Taibe produced a driver's license. The driver of the car also had no weapon and produced a driver's license. Certainly, even if the intrusion was warranted, at that point the officers found nothing and since the occupants of the car were not carrying weapons and they produced valid driver's licenses, if

anything, the agents' suspicions should have been allayed as a matter of law.

If the initial stop was proper, it could only be limited to a pat-down or quick frisk. The Court of Appeals for the Second Circuit made that clear in United States v. Oates, at 61. It said:

> "That the initial 'stop' was permissible does not, of course, establish, without more, that any search or 'frisk' incident to that stop was equally sustainable. Case law teaches that any search of the detainees must be limited to a protective frisk for weapons (citations omitted), and before such a pat-down search can be conducted the police officer must have reason to believe that the suspect may be armed and dangerous."

In the case at bar, the interference with the liberty of the petitioner was more than a trivial stop for investigative purposes. It is contended that when officers order a passenger out of a car three times with guns drawn and place him against the car with his hands on top, that such activity constitutes an arrest. No probable cause existed at that time for the arrest of the petitioner. If, however, it is assumed that an arrest did not take place, and that the agents' conduct only constituted a pat-down, then their search for weapons bore no fruit and the production of identification should be held to have eradicated their suspicions. At this point, no further police action was warranted or proper, and any claimed

consent should fall as a matter of law without even inquiry into voluntariness.

This is not a case where a glassine bag was observed to have been exchanged prior to the detention, People v. Quinones, 33 N.Y.2d 811 (1973), or a tell-tale paper bag was taken from a building known for its narcotics trade, United States v. Santana, 485 F.2d 365 (2nd Cir. 1973), cert. den. 415 U.S. 931 (1974). The simple giving of a baggage ticket to a friend to obtain one's baggage is a meaningless act. Likewise, the possession of a large sum of money, such as the $40,000.00 in this case, is also perfectly legal. The petitioner gave the explanation that he had earned this money on the Alaska pipeline. That explanation, as was demonstrated at the time of sentence, was absolutely true, since the petitioner had a long history of employment on the pipeline. Moreover, his wife, a native born Alaskan, was given shares of a corporation formed by the government, wherein Alaskans were entitled to certain royalties on oil going through the pipeline. The certificates she holds, and which generate continuous income, are worth more than $200,000.00. Absolutely nothing that the petitioner did in this case was illegal or suspicious. It is most respectfully contended that the agents had no right to order him out of the car, but having done

so, when a search of his person produced nothing and he produced valid identification, any further activity on their part was improper.

POINT II

THE TRIAL COURT WAS WRONG AS A MATTER OF LAW AND FACT WHEN IT FOUND THAT PETITIONER'S CONSENT WAS FREELY GIVEN.

The Trial Court paid homage to Schneckloth v. Bustamonte, 402 U.S. 218, (1973) and United States v. Ruiz-Estrella, 481 F.2d 723 (2nd Cir. 1973), but then it apparently disregarded the principles enunciated in both decisions in finding that the facts of the case at bar supported a finding of valid consent. The Court stated that the petitioner was not in custody when his consent was obtained, assuming it was obtained at all. He was in the airport parking lot, which is a public area, and the Court relied on the fact that the agents had already returned their guns to their holsters and used a conversational tone in obtaining permission without promises or threats. It is most respectfully suggested that this finding is improper and that the facts do not justify such a decision. Firstly, the petitioner denied giving his consent, a perfectly normal act since, as Judge Judd said in United States v. Averell, 296 F.Supp. 1004, 1019 (E.D.N.Y.

1939):

> "A person in custody does not normally invite the arresting officer to obtain incriminating evidence."

Petitioner was made to exit the car at gunpoint, and only after the agents banged on the windows and shouted three times. He was then placed with his hands on the car and searched and then Agent Sears read petitioner his rights. It is hard to imagine a more complusive atomsphere than that at bar, and it would be fantastic to imagine that petitioner would have been allowed to leave if he tried. After all, when the order to get out of the car was first given and the two men did not respond, the agents did not allow them to leave but forcibly insisted that they comply with, not their request, but their order. This does not seem to be a casual transaction and the returning of the guns to the holsters also should not be a fact to be relied on, since if petitioner tried to leave, there is no question that the guns would have quickly re-appeared.

The Court of Appeals in Ruiz-Estrella recognized this Court's recent review of the whole question of consent searches in the Schneckloth case. It has clearly been recognized that the law of the land requires that the burden of proving that consent is freely and voluntarily given

rests on the government. See also Bumper v. North Carolina, 391 U.S. 543 (1968).

The government's burden cannot be made by showing "... acquiescence to a claim of lawful authority." United States v. Ruiz-Estrella, supra, at 727. Consent searches are to be carefully scrutinized, and in Ruiz-Estrella it was decided that the compliance with a request of a sky marshal in handing over a bag where the request took place after the uniformed agent showed his badge and took the defendant away from a boarding area into a stairwell, did not meet the government's heavy burden. It was pointed out that in Schneckloth, the atmosphere was congenial, because the automobile passenger who consented to a search was in the presence of five companions in a roadside encounter that was friendly. Also, in that case the driver of the car verified that consent was freely given. The atmosphere in this case was far from congenial. The agents had their guns drawn. The occupants of the car were forced out after much shouting and banging on the windows and both of their hands were placed on top of the car. In addition, unlike Schneckloth, the petitioner and his friend both denied that consent had been given and, in fact, the other two agents, Sears and Miranda, never really heard petitioner give his consent. It was only one agent, Huber, who testified that he got consent. Huber's believability is

far from ideal, as he obviously lied when he said that the other two agents, Sears and Miranda, did not have their guns drawn. These agents testified differently, Miranda acknowledging that all three had their guns out and Sears acknowledging that at least two had their guns drawn. Even the Trial Court implied that it thought that the guns had been drawn when it said:

> "Moreover, the agents had returned their guns to their holsters when the defendant's consent was obtained."

Petitioner was not told that he did not have to consent to the search, a fact which is to be considered. United States v. Smith, 543 F.2d 1141, cert. den. 429 1110 (5th Cir. 1976). Even though the agents claimed that there was no technical arrest in this case until petitioner was taken to their headquarters, still Courts have recognized the fact that a person is still in a custodial status even though he accompanies the police to their precinct at police request. United States v. DeMarco, 488 F.2d 828 (2nd Cir. 1973). The government's burden is heavy and proof of consent must be clear and positive. United States v. Como, 340 F.2d 891 (2nd Cir. 1965). The fact that the atmosphere indicates that the petitioner was in some sort of custody does not alone vitiate the consent, but it does render the situation subject to

more careful scrutiny than normal. United States v. Wiener, 534 F.2d 15 (2nd Cir. 1976). That idea is reasonable because after an arrest or after one is taken into custody he is more susceptible to duress and coercion. United States v. Jones, 475 F.2d 723, cert. den. 414 U.S. 841 (5th Cir. 1973). Thus, where a defendant gives keys to his automobile to the police after he was in custody because they had guns drawn and they told him that although they had no search warrant, they could get one, it was held that consent was not vuluntary. Weed v. United States, 340 F.2d 827 (10th Cir. 1965). Even subtle coercion based on an assertion of authority, such as the color of office implied by a badge or other officiality, can destroy the voluntariness and freedom of a consent. United States v. Ruiz-Estrella, supra; United States v. Rothman, 492 F.2d 1260 (9th Cir. 1973); United States v. Griffin, 530 F.2d 739 (7th Cir. 1976). When one considers the totality of the circumstances, which is the appropriate test, Schneckloth v. Bustamonte, supra; United States v. Mariani, 539 F.2d 915 (2nd Cir. 1976), one cannot reasonably conclude that the government has shown by clear and positive proof that petitioner, Taibe, consented to the search of his suitcase on the facts of this case. There have been many examples where Courts

have placed a heavy burden upon the government where constitutional rights were involved. The burden of establishing consent to a search is just one instance. The government is charged with the burden of showing that there has been no improper use of testimony under a State granted immuhity. Zicarelli v. New Jersey, 402 U.S. 492 (1972); Murphy v. Waterfront Commission of New York, supra. It is not hard to call to mind similar examples and, in fact, in Point III herein, it can be seen that the government also has the burden of showing evidence came from independent sources, inevitable discovery or from an attenuation situation, when these exceptions are sought to be relied on to avoid exclusion of the product of illegal searches. However, as the United States District Court in Florida said in United States v. Massey, 437 F.Supp. 843,854, n.4 (1977):

> "As a practical matter, the burden is shifted to the defendant because all the government has to do is make the claim."

Petitioner urges that this Court consider the fact that more Courts should consider the practical and factual consequences of the general principles of law they announce. In other words, when a police officer testified that he warned the defendant of his Miranda rights, even though that may be a lie, it is testimony that a defendant, as a

practical matter, can almost never counteract. Similarly, when the government claims that it has not improperly used a defendant's State grand jury testimony taken under a grant of immunity, it is almost impossible for a defendant to know what occurred between government officials, so that as a practical matter he can never be in a position to contradict the naked claim of the government.

The same is true about the consent search situation. The Courts all acknowledge that the government has a heavy burden, yet as a practical matter they allow that burden to be met by the mere statement of an agent that the defendant consented to the search. In Schneckloth v. Bustamonte, supra, one of the defendant's friends, the driver of the car, corroborated the testimony of the agent that a consent has been given. In the case at bar, Agent Huber's testimony is not only uncorroborated but it differs materially from that of the other agents. In other words, he said that he and Miranda did not have their weapons out, but Miranda said that all three had their guns drawn. Sears said that at least two, possibly three, had their guns out, and Taibe and his friend, Michael Tullo, said that all three had their guns out. The testimony of Huber, which is seriously impeached

on the all important question of whether weapons were drawn, is the only testimony relied on by the government to establish consent. Both other agents did not hear consent given, but they in essence testified that they thought Huber had gotten consent, testimony, no doubt, based upon Huber's hearsay statements to them. Again, we refer to Judge Judd's observation that normally people who are criminals are not so stupid whereby they so easily will incriminate themselves. If petitioner was really coming to New York to purchase cocaine, and if he had any experience in that field, he would have known what was in the suitcase, and it is difficult to imagine anything more fantastic than the petitioner so quickly consenting to the search of the suitcase and again to the search at D.E.A. headquarters.

A search warrant could have been obtained, since the automobile could easily have been secured. The search cannot be justified as incidental to an arrest pursuant to Chimel v. California, 395 U.S. 852 (1969), since there are no grounds for an arrest, and the agents testified that they did not arrest Taibe anyway. The point of the matter is that this case demonstrates an unwarranted search and the agents sought to sustain it on a very tenuous claim of consent.

POINT III

THE TRIAL COURT IMPROPERLY APPLIED THE INEVITABLE DISCOVERY THEORY TO THE SEIZURE OF THE NARCOTICS THAT ALLEGEDLY FELL FROM PETITIONER'S JACKET.

Apparently, the Trial Court had its own doubts about the believability of Agent Huber's testimony, even though it did not go so far as to disbelieve him regarding the issue of consent. Be that as it may, the Court did find that the picking up of Taibe's jacket was not inadvertent, but was based upon suspicion, and the seizure of the packet of narcotics was not sustained on the plain view doctrine. Of course, petitioner feels that a reading of the record clearly shows that the agent's testimony that the packet even fell out of the jacket at all is not credible. The jacket had deep pockets, and the pocket from which the packet allegedly fell was cut away so that the narcotics and the $40,000.00 could be secreted in the lining. But even accepting the testimony that the packet did fall out, it is suggested that the application of the inevitable discovery doctrine was inappropriate. The Court apparently held that, after it found consent to the suitcase search, the finding of the narcotics implements and lactose in the suitcase gave the officers the right to search the entire automobile.

Of course, the agents admitted that nothing found in the suitcase constituted a federal crime, so it is hard to see how probable cause could then have been established for a continued search, but the Court held that it did, and the narcotics would have been found anyway, since the jacket could have been searched. The agents stated that they had probable cause to believe that the vehicle contained other contraband and they could have searched it because of its mobility. Petitioner argues that such is not the case, but still, the mere fact that an automobile is involved does not create greater rights, especially where there is no search incidental to an arrest. The 8th Circuit, in the recent case of United States v. Stevie, 23 Cr. L. 2489, decided August 15, 1978, said that notwithstanding United States v. Chadwick, 433 U.S. 1 (1977), where the circumstances are such that time for a search warrant is provided, the requirement should not be automatically dispensed with. This is especially true where the search did not apply to the car but to things found in the car, such as a suitcase. Of course, the jacket in the car would stand in the same position. Petitioner believes that the inevitable discovery doctrine does not apply in this case, and that it should not be adopted with

regard to speculative situations such as was found in the present case. The Second Circuit recognized the doctrine in United States v. Jarvis, 560 F.2d 494 (2nd Cir. 1977), but that case applied to a situation that did not involve any degree of speculation. In Jarvis, there was a warrantless arrest inside the defendant's home, and the taking of his photograph and his palm print were sought to be suppressed. Although the Court held that the exigencies of the situation did not uphold the arrest in the home, since they could have waited outside and arrested him in the street and obtained the photograph and palm print anyway. That case involved no guessing, since probable cause for the arrest existed and it did not require any inferences to be drawn as to what would have happened after the illegal conduct. That was the only case where the Second Circuit recognized the doctrine, since it is submitted that the District Court's reliance on United States v. Ceccolini, 542 F.2d 136 (2nd Cir. 1976) cert. granted 431 U.S. 903 (1977),was misplaced. The Ceccolini case dealt with the discovery of the identification of a witness from "independent investigation", so that the decision dealt with the first of three exceptions as to the exclusionary rule. As can be seen from the dissent in United States

v. Villarreal, 565 F.2d 932, 941-942 (5th Cir. 1978), there are three exceptions wherein the taint can be removed from the product of an illegal search or other illegal governmental conduct. They are: (1) where the information comes from an independent source which leads to the same fact or product; (2) the attenuation exception, where there is an intervening independent act which is sufficient to break the casual connection; and (3) the inevitable discovery doctrine where the exclusion of the fruits of the poisoned tree would be avoided because the fruite would have been there anyway without the government's illegal act. It is submitted that Ceccolini dealt only with the independent source exception. It is also submitted that recognition of the eventual discovery doctrine should apply only to cases like Jarvis wherein no speculation is required into the facts, but should not extend to situations like this case, whereby there is great doubt and conflicting testimony regarding the actions of the agents, where there was no consent, the reasons for touching the petitioner's jacket, where the narcotics actually fell from the jacket and where the search of the suitcase itself created probable cause to search further.

The Trial Court correctly pointed out that there

is a great difference of opinion as to the wisdom and acceptance of the eventual discovery doctrine. In fact, in Villarreal, the 5th Circuit specifically rejected the doctrine because it would require speculation by the Court as to what would have happened had the illegality not occurred. A reading of the Villarreal case and the decision and footnotes in United States v. Massey, supra, shows the whole divergence of opinion as to the wisdom of the eventual discovery rule, and it was pointed out that this Court has been silent on the subject. The 7th Circuit has expressly recognized it. United States ex rel Owens v. Twomey, 508 F.2d 965-966 (7th Cir. 1974). The Court said that the 2nd Circuit recognized it in Ceccolini, but for the reasons above stated, that may not be the case. The 4th Circuit probably has recognized it, United States v. Seohnlein, 423 F.2d 1051,1053, cert. den. 399 U.S. 913 (4th Cir. 1970), and the 3rd Circuit seems to have recognized it, although the opinion is confusing. Case of Virgin Islands v. Gereau, 502 F.2d 914, 927-928 (3rd Cir. 1974), cert. den. 420 U.S. 909 (1974). The 8th Circuit has intentionally avoided the decision, United States v. Kelly, 547 F.2d 82, 86 (8th Cir. 1977), reversed on other grounds, 414 F.Supp. 1131 (W.D.Mo. 1976), and most other Courts of Appeals have not made a decision, as can be seen from the

opinion in United States v. Kelly, supra. The Court pointed out that the inevitable rule is "... an aberrant and unorthodox." United States v. Massey, supra, Page 854, footnote 3. It also cites as one of the reasons why there has not been more accptance of the rule is the fact that even though Court hold that the burden is on the government to establish the inevitable discovery of the material seized, that burden is met fully by the government making a claim that it would have found the product anyway, so that, in fact, the burden is really shifted to the defendant, and it is a burden that as a practical matter he can hardly ever meet. We believe that the Court's reliance on the inevitable discovery doctrine is wrong, and we believe further that the search of the suitcase, which contained nothing that would amount to a federal crime, gave the agents no right to search further without obtaining a warrant. This is certainly true with regard to the search of the jacket and the second search of the suitcase. We also believe that Jarvis should be limited to its facts and situations such as that at bar are too speculative and require the Courts to engage in needless guesswork. We also believe, as discussed in Point IV, that even after the finding of the cocaine in the jacket, there was still no federal crime.

POINT IV

THE EVIDENCE BELOW DID NOT ESTABLISH THE COMMISSION OF A FEDERAL CRIME AS A MATTER OF LAW.

The possession of cocaine pursuant to 21 U.S.C. 841(a)(1), which is the charge in this case, is not a federal crime unless the possession is with intent to distribute. There is no doubt about the validity of that statement, since Congress intended to punish distributors, not possessors. United States v. Oropeza, 564 F.2d 316 (9th Cir. 1977). The Trial Court recognized this and clearly charged the jury that the intent to distribute was an unavoidable and essential element necessary to convict. Regardless of that charge, however, the facts of this case clearly show that not one scintilla of evidence existed on which any reasonable jury could have based a finding of intent to distribute, and this conviction should be reversed as a matter of law. In fact, if anything, the evidence showed that there was no intent to distribute in this case. The finding of narcotics which are possessed for personl use by an addict annot constitute a federal crime. United States v. Oropeza,supra, Page 322. Thus, where an addict was found to possess a supply of heroin for his own use, the fact of such possession alone was held

insufficient to convict him of possession with intent to distribute. United States v. Owens, 344 F.Supp 1355 (W.D. Tex. 1972), aff. 475 F.2d 759 (5th Cir. 1973).

In United States v. Thomas, 551 F.2d 347 (D.C. Cir. 1976), the Owens decision was discussed, and it was decided that the finding of nine foil packets of heroin would be an insufficient amount to support an inference of possession with intent to distribute, although on the facts of Thomas, the inference was proper because the officer also testified to having made a direct sale from the defendant, so that the jury could have considered that also. There have been other factors which when considered along with the fact of possession have been held to logically give rise to an inference of possession with intent to distribute. For example, the way in which the narcotics are packaged and the quantity beyond that normally possessed for personal consumption would be significant. United States v. Reese, 561 F.2d 894 (D.C. Cir. 1977). Likewise, the resale value of the drug would support the inference, United States v. Ramirez-Rodriquez, 552 F.2d 883 (9th Cir. 1977), as would the previous experience of a direct purchase for an amount, as discussed in United States v. Thomas. The amount of cocaine possessed may also be

significant. Thus, in United States v. Mather, 465, F.2d 1035, cert. den. 409 U.S. 1084 (5th Cir. 1972), possession of almost 200 grams, the equivalent of close to 8 ounces, in itself could support the inference. See also United States v. Giles, 536 F.2d 136 (6th Cir. 1976); United States v. Grant, 545 F.2d 1309, cert. den. 97 S.Ct. 1139 (2nd Cir. 1976); United States v. Perry, 480 F.2d 147 (5th Cir. 1975); United States v. Luciow, 518 F.2d 298 (8th Cir. 1975).

In the case at bar, the facts negate rather than establish intent to distribute. The net weight of the cocaine found in the package was less than 2 ounces, to wit: 40 grams, an amount certainly consistent with personal use. In addition,the government expert testified that most cocaine came through Florida and South America, so that the petitioner was not apparently in New York to sell cocaine. Even assuming that the $40,000.00 found in Taibe's jacket was to be used to purchase cocaine, there is no evidence of such, and the purchase had not been made yet, so there can be no possession based upon that fact. The truth is that the money had come from the petitioner's employment on the Alaska pipeline, and there is no evidence in this record to the contrary. In addition, as counsel correctly pointed out,

narcotics sellers obviously operate in the same manner. If petitioner was a cocaine dealer, the lactose found in the suitcase would normally have been the cutting agent, yet the reports show that the cocaine found in his jacket had been cut with lidocaine and inositol, so that the cocaine possessed by him was different than any cocaine he would have bought and then used lactose to cut. There is absolutely nothing in this case to show that the cocaine in Taibe's jacket was anything other than his own personal cocaine. As such, possession of that small amount could in no way constitute a federal crime. The government expert also testified that the cocaine had been cut to the street level limit, so that it is not reasonable to suppose that Taibe would have cut it further and sell it at a profit. The evidence shows that it had already been cut and that, if anything, petitioner was the ultimate user.

If the requirement that a jury find intent to distribute has any meaning, that intent must be found on some sort of evidence that could be pointed to. Thus, in Thomas, where the amount was also small, the agent had testified to a previous direct purchase from the defendant. Here, such is not the case. The agents never met with petitioner, they had no prior dealings

with him and he did not possess enough cocaine to give rise to the reasonable inference that he intended to distribute it to others. The other information that petitioner had previously dealt on the Alaska pipeline is not relative, since it was not introduced at the trial anyway. It was hearsay, and it was only germane to the probable cuase issue. In short, there is not one iota of evidence in this case that a reasonable jury could use to infer an intent to distribute.

CONCLUSION

THE PETITION OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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Of Counsel

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of November one thousand nine hundred and seventy-eight.

Present:

HON. IRVING R. KAUFMAN

HON. WILLIAM H. TIMBERS

HOM. MURRAY I. GURFEIN

Circuit Judges,

- X

UNITED STATES OF AMERICA,

Appellee, 78-1253

v.

JOSEPH TAIBE,

Appellant.

- X

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

With respect to appellant;s claims challenging the district court's denial of his motion to suppress evidence seized at the time of his arrest, we affirm substantially for the reasons stated in Judge Costantino's memorandum and order of March 17, 1978. 446 F.Supp. 1142.

With respect to appellant's challenge addressed to the sufficiency of the evidence, viewing the evidence in the light most favorable to the government as we must at this stage, Glasser v. United States, 315 U.S. 60, 80 (1942), we hold that the evidence was sufficient to support the confiction.

IRVING R. KAUFMAN

WILLIAM H. TIMBERS

MURRAY I. GURFEIN

Circuit Judges

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- X

Mar. 17, 1978

UNITED STATES OF AMERICA

77-CR-512

v.

MEMORANDUM AND ORDER

JOSEPH M. TAIBE

- X

Appearances:

David G. Trager, U.S. Attorney, E.D.N.Y., by Lawrence Zweifach, Ass't U.S. Attorney, for the United States

Martin Light, 66 Court Street, Brooklyn, New York 11201, for defendant

COSTANTINO, D.J.

The defendant, Joseph Taibe, is charged with possession of cocaine with intent to distribute in violation of 21 U.S.C. Section 841(a)(1). Taibe moves to suppress the physical evidence seized from him at the time of his arrest on August 24, 1977. A suppression hearing was held and the following facts were established.

At approximately 3:00 P.M. on August 24, 1977, Drug Enforcement Administration ("DEA") Special Agents John Huber, Robert Sears and Louis Miranda had occasion to review a DEA airport log entry which informed

them that Joseph Taibe would be arriving at John F. Kennedy International Airport aboard United Airlines Flight 40 from Fairbanks, Alaska at approximately 4:30 P.M. Flight 40 had made a stop-over in Seattle, Washington enroute to New York. A security check at the Seattle Airport revealed that Taibe was carrying approximately $30,000 in cash and was travelling with an airline ticket issued to John Melli. The agents also reviewed a DEA computer print-out which indicated that Taibe was identified by the DEA as a drug trafficing suspect.

At approximately 4:45 P.M. the three agents initiated a surveillance of Taibe. He was observed deplaning and proceeding to the waiting area where he was met by Michael Tullo. After a brief conversation, Taibe gave Tullo his baggage claim ticket. The two men took separate escalators, riding parallel to each other toward the baggage area. Once at the baggage area, Tullo went to the baggage carousel and retrieved Taibe's suitcase, while Taibe, followed by Agent Miranda, exited the terminal and entered the airport parking lot.

Tullo, followed by Agents Huber and Sears, then exited the terminal with Taibe's suitcase. He met Taibe

in the parking lot and both men proceeded to Tullo's parked automobile. Tullo placed Taibe's suitcase in the back seat of the automobile behind the driver's seat. Tullo seated himself in the driver's seat while Taibe occupied the front passenger's seat.

Agents Huber and Sears approached Tullo's vehicle at the passenger's side while Agent Miranda approached the vehicle at the driver's side. At the time of the approach, the windows of the vehicle were raised, the doors were locked, and the engine was not running. The agents identified themselves, displayed their credentials and asked the occupants to get out of the automobile. For some moments Taibe and Tullo did not exit the automobile. Agent Huber testified that they appeared confused during this time period (Tr. 17)[1]. Agent Sears testified that he observed Taibe attempting to stuff his coat under the front seat of the automobile (Tr. 65). Agents Miranda and Sears then drew their revolvers. Agent Sears attempted to open the door to the vehicle, discovered it was locked, and banged on the window. The agents began shouting for the occupants to get out of the vehicle.

Taibe and Tullo exited the automobile. They were searched for weapons and asked to show identification.

Agent Huber asked Taibe for permission to look through his suitcase. Taibe gave his consent to such a search. Agent Sears informed Agent Huber that he had seen Taibe attempt to stuff his coat under the front seat of the car. Agent Huber went to the open door on the passenger side of the vehicle, reached for Taibe's suitcase which was on the rear seat on the driver's side, and brought it to the front seat of the car. He picked up Taibe's jacket from the floor of the car near the front seat and as he was doing so a handkerchief and a bag containing white powder fell out of the left-hand side pocket of the jacket and onto the sill of the car door. Agent Huber asked Tiabe if he knew what was in the bag. Taibe said he did not know. Agent Huber placed the jacket on the front seat and brought the suitcase to the trunk area where it was searched.

Agent Huber found a brown paper bag in the suitcase. Inside the paper bag was a clear plastic bag containing white powder which was later found to be lactose. Agent Huber also found a box with the words, "Drug and Narcotics Identification Kit" written on it. At this point, Taibe was given his Miranda warnings. He and Tullo were asked if they would accompany the agents to the DEA office and they agreed to do so.

Neither Taibe nor Tullo were placed under arrest at this time. Agent Huber took the suitcase, jacket, handkerchief and bag of white powder, and locked the door to the automobile, giving the keys to Tullo.

Taibe, Tullo and the agents proceeded to the DEA office. At the office, Agent Huber performed a field test on the powder that had fallen from Taibe's jacket and determined that the substance was cocaine. Taibe and Tullo were placed under arrest and given their Miranda warnings. Agent Huber asked Taibe's consent to search his suitcase again, advising Taibe that a search warrant could be obtained to search his baggage in any event. Taibe agreed to a second search of the suitcase which led to the discovery of two razor blades, a mirror, a small spoon, and a plastic tube labeled "quality tester, diometer,"- "coke" in addition to the bag containing lactose and the narcotics identification kit. Taibe's jacket was also searched and approximately $42,000. in cash was found.

Defendant Taibe propounds two arguments in support of his motion to suppress the physical evidence seized from him. First, he asserts that the DEA agents lacked probable cause to stop him for investigative purposes and that, therefore, the subsequent search was improper. Second, defendant argues that assuming

the agents were justified in stopping him, he did not freely and voluntarily consent to the search of his suitcase and jacket which led to the discovery of the cocaine in his possession.

The government argues that there was reasonable suspicion to justify the limited investigative stop of the defendant, that the defendant voluntarily consented to the search of his suitcase, and that in the course of the suitcase search the cocaine which fell from the defendant's jacket inadvertently came within the "plain view" of Agent Huber. The government also offers two variations of the so-called "inevitable discovery" doctrine to support the validity of the search and seizure in issue. Under the first variation, the government contends that the search of the suitcase, to which the defendant voluntarily consented, established probable cause to search the vehicle. Given the then extant exigent circumstances, a warrantless search of the vehicle was justifiable and the discovery of the cocaine in the defendant's jacket was inevitable. The government's second variation of the "inevitable discovery" doctrine is urged if the court should find that the consent search of the defendant's suitcase was improper. According to this argument, the government claims that there was probable

cause to search the vehicle prior to the time Agent Huber entered the vehicle to reach for the defendant's suitcase, and that the seizure of the cocaine was, again, inevitable.

The court turns first to defendant's argument that the DEA agents lacked probable cause to stop him. As the government correctly points out, the Supreme Court, in Terry v. Ohio, 392 U.S. 1 (1968), established that a "police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." Id. at 22. See also Adams v. Williams, 407 U.S. 143 (1972). Police officers are permitted to make brief investigative stops of individuals based on the reasonable suspicion that such individuals are engaged or are about to become engaged in criminal conduct. United States v. Oates, 560 F.2d 45, 59 (2nd Cir. 1977).

The proper starting point in analyzing the constitutionality of the conduct of the special agents is to determine whether they are able to point to "specific and articulable facts which, taken together with rational inferences from those facts", reasonably warranted stopping the defendant at the airport parking lot. Terry v. Ohio, supra at 21. Bearing in mind the observation of the

Court of Appeals for the Second Circuit that the test for a reasonable stop is "rather lenient", United States v. Santana, 485 F.2d 365,368 (2nd Cir. 1973), cert. denied 415 U.S. 931 (1974); see also United States v. Magda, 547 F.2d 756, 759 (2nd Cir. 1976), the court finds that the original stop of the defendant did not constitute an unreasonable seizure of his person.

The following "specific and articulable facts", when "viewed through the eyes of a reasonable and cautious police officer, guided by his own experience and training" United States v. Hall, 525 F.2d 857,859 (D.C. Cir. 1976), were sufficient to justify the stop:[2]/

(1) The DEA agents were made aware of the fact that the defendant was a drug trafficing suspect;

(2) The defendant was known to be travelling with a large sum of cash;

(3) The defendant was travelling with an airline ticket in the name of another individual;

(4) The defendant engaged in what could be considered suspicious behavior when he met Tullo at the airport[3]/;

(5) Narcotics trafficking is a serious offense; and

(6) The suspects were about to depart from the

airport, possibly with narcotics, a "readily disposable commodity." United States v. Oates, supra at 59, quoting from United States v. Lampkin, 464 F.2d 1093, 1077 (3rd Cir. 1972). In light of the above factors, the court finds that the initial stop of defendant Taibe was not unreasonable.

Having found the stop of defendant proper, the court also concludes that "the gravity of the intrusion which the stop entailed", United States v. Magda, supra at 758, was not unreasonable under the circumstances. A request for personal identification was a minimal intrusion and a pat-down search for weapons was permissible because the DEA agents could reasonably have believed that the suspects were armed and dangerous./[4]

While it is true that in general a search conducted without either a warrant or probable cause is improper, see, e.g., Katz v. United States, 389 U.S. 347 (1967), one of the well-recognized exceptions to that rule is where the defendant consents to the search. See, e.g., Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Since the court finds that defendant voluntarily consented to the search of his suitcase, the need for a warrant was obviated.

The defendant argues that because he was forced

out of Tullo's vehicle at gunpoint and then subjected to a pat-down search for weapons, any consent to search his suitcase was not given freely and voluntarily. He relies on United States v. Ruiz-Estrella, 481 F.2d 723 (2nd Cir. 1973), to support his contention that "(u)nder these particular facts, the government has shown no more than acquiescence to apparent lawful authority, and the theory of consent cannot be accepted." Id. at 728.

Looking, as it must, to the "totality of the circumstances, surrounding the defendant's consent to the suitcase search, Schneckloth v. Bustamonte, supra at 227, the court believes that the facts of this case are sufficiently distinguishable from Ruiz-Estrella to warrant a different conclusion on the issue of the voluntariness of the defendant's consent. In Ruiz-Estrella, the defendant "consented" to be searched only after a uniformed agent had taken him from the boarding area of the airport into a stairwell and closed the door behind them. The Court of Appeals found that the environment in which the police questioning took place was similar to a "traditional custodial situation." United States v. Ruiz-Estrella, supra at 728. In the instant case, however, the defendant was not in custody when his consent was obtained; he was in the airport parking lot, a public area that "was not inherently coercive, being

a far cry from custodial 'interrogation in some remote station house.'" Id., quoting from Schneckloth v. Bustamonte, supra at 247. Moreover, the agents had returned their guns to their holsters when the defendant's consent was obtained.[5] Agent Huber used a conversational tone of voice when requesting the defendant's permission to search, and no promises or threats were made in obtaining the consent.

Under these circumstances, the court finds that the defendant's consent to the suitcase search was freely and voluntarily given. The court's analysis cannot end there, however, because it was not the search of the defendant's suitcase that led to the discovery of the cocaine in his possession. Rather, the cocaine was discovered after Agent Huber lifted the defendant's jacket from the floor of Tullo's automobile and the plastic bag containing cocaine fell out of the jacket. Huber's act of picking up the defendant's jacket went outside the scope of the limited consent to search that he had obtained. In addition, the act was not committed in furtherance of the legitimate activity of retrieving the suitcase from the back seat of Tullo's vehicle. The government concedes "that the extent of a search conducted pursuant to voluntary consent is limited

by the bounds of the actual consent." (Government's Memorandum of Law at 23). It argues, however, that Agent Huber's movement of the defendant's jacket "was motivated by a benign purpose and was executed in good faith" (Id.)[6], that Huber did not employ Taibe's consent as a pretext for a search of the vehicle, and that the discovery of the cocaine was inadvertent, bringing it within the ambit of the "plain view" doctrine. See Coolidge v. New Hampshire, 403 U.S. 443 (1971).

The court finds that Agent Huber did not act inadvertently in picking up the defendant's jacket and therefore the seizure of the cocaine cannot be justified under the "plain view" doctrine. Huber knew that Agent Sears had seen the defendant trying to stuff his jacket under the front seat of the automobile. It is reasonable to conclude that he picked up the jacket because he was suspicious about what the defendant was attempting to hide, not because he was interested in protecting him from the elements.[7] To fall within the "plain view" exception to the warrant requirement, the discovery of evidence must be inadvertent. Coolidge v. New Hampshire, 403 U.S. 443, 469 (1971). Because the court finds that the discovery of the cocaine here was not inadvertent, the "plain view" doctrine cannot justify

the agents' seizure of the cocaine.

In addition to this assertion that the "plain view" doctrine applies to this case, the government also argues that the warrantless seizure of the cocaine was valid by virtue of the "inevitable discovery" doctrine. The government urges that the contents of the suitcase, which were discovered as a result of defendant's valid consent to search the suitcase gave rise to probable cause to search Tullo's vehicle. Exigent circumstances would then have justified an immediate search of the vehicle and, during the course of what would then have been a valid search, the cocaine would inevitably have been discovered./[8]

The court agrees with the government that under these circumstances the cocaine in the defendant's possession would have been discovered even if Agent Huber had not illegally searched the defendant's jacket. The valid consent search of the suitcase led to the discovery of a bag of white powder and a narcotics identification kit. These items, coupled with the defendant's suspicious behavior at the airport and the fact that he was suspected of drug trafficking, gave rise to probable cause to believe that Tullo's vehicle contained additional contraband. Because of the potential mobility of the car and its location in a public parking lot, the agents

could have conducted an immediate search of the automobile, Cardwell v. Lewis, 417 U.S. 583 (1974); Chambers v. Maroney, 399 U.S. 42 (1970), and in all likelihood the cocaine would have inevitably been discovered.

While the "inevitable discovery" doctrine requires the court to engage in hypothetical reasoning to determine whether an independent source for the discovery of otherwise illegally obtained evidence existed, the Court of Appeals for the Second Circuit appears to have endorsed such an analysis./[9] See United States v. Jarvis, 560 F.2d 494 (2nd Cir. 1977); United States v. Ceccolini, 542 F.2d 136 (2nd Cir. 1976), cert. granted, 431 U.S. 903 (1977). In Jarvis, the defendant was illegally arrested when the police entered his home with an invalid warrant. He sought to suppress certain evidence that was obtained subsequent to that arrest. The court found that the agents had probable cause to arrest the defendant and, had they waited outside his home, they could have arrested him when he emerged based solely on probable cause. Then they would have obtained the evidence which the defendant sought to suppress. The court concluded that the illegal arrest was not a "but for" cause for the introduction of the evidence which the defendant sought to suppress and therefore the motion

to suppress was denied. United States v. Jarvis, supra at 498.

The fact situation in this case is sufficiently similar to that in Jarvis to warrant the same result on the motion to suppress. As in Jarvis, "no evidence is being challenged which could not have been obtained even without the illegal (search)."Id. at 499. The government is not attempting to exploit an unlawful search "by obtaining a conviction on the basis of the very evidence not shown to have been otherwise procurable, which it hoped to obtain by its unconstitutional act." Id.

Accordingly, for all of the above-mentioned reasons, the defendant's motion to suppress the evidence seized from him is denied. So ordered.

MARK COSTANTINO
U.S.D.J.

FOOTNOTES

1/
Numbers in parentheses refer to the transcript of the suppression hearing held on January 10, 1978.

2/
The reasonableness of the DEA agents' suspicions must be gauged from their perspective. United States v. Oates, supra at 61, and cases cited therein. It is therefore relevant that the three agents have had considerable experience with narcotics investigations. Agent Huber has worked for the DEA for approximately seven years and has participated in two to three hundred airport arrests. Agent Sears has worked for the DEA for seven years and Agent Miranda has two and one-half years experience with the DEA.

3/
In view ofthe fact that the agents were aware that the defendant was a suspected drug trafficker, the fact that he gave his baggage ticket to Tullo, that he and Tullo rode separate escalators and that he exited the airport without his suitcase, which was subsequently retrieved by Tullo, could reasonably be seen as suspicious behavior. In making this determination, the court considers the circumstances at the airport in toto. See United States v. Oates, supra at 61, and cases cited therein.

4/
First, both suspects had an opportunity to obtain weapons after they entered Tullo's vehicle. Second, the suspects' delay in exiting the vehicle after they had been ordered to do so, taken in conjunction with the defendant's attempt to stuff his jacket under the front seat, warranted the agents' suspicion that criminal activity was afoot and that the suspects might be carrying weapons. The test for reasonable suspicion that an individual is armed and dangerous is not difficult to meet. United States v. Riggs, 474 F.2d 699,705 (2nd Cir.), cert. denied, 414 U.S. 820 (1973).

5/
United States v. Thompson, 356 F.2d 216 (2nd Cir. 1965) and United States v. Sullivan, 321 F.Supp. 597 (S.D.N.Y. 1971), indicate that the fact that an individual is con-

fronted by police officers with their guns drawn does not of itself vitiate the consent to search.

6/
Huber testified that while he was in Tullo's automobile retrieving the defendant's suitcase, he picked up the jacket to tive it to the defendant because it had begun to rain and the defendant was coatless.

7/
In fact, Huber never gave the defendant his jacket; he left it on the front sear of the automobile after the cocaine fell out of the pocket.

8/
Because the court has determined that the agents conducted a valid consent search of the defendant's suitcase, it need not address the government's alternative argument under the "inevitable discovery" doctrine that probable cause to search the vehicle existed prior to the time that Agent Huber entered the vehicle, that exigent circumstances existed to justify a warrantless search of the vehicle, and that, therefore, discovery of the cocaine was inevitable.

9/
The Fifth Circuit has rejected the "inevitable discovery" rule "because it requires speculation by the Court as to what would have happened had the illegality not occurred." United States v. Villarreal, 565 F.2d 932, 942 (5th Cir. 1978) (Wisdom, J., dissenting) and cases cited therein. The rule has never been endorsed by the Supreme Court. United States v. Massey, 437 F.Supp. 843, n. 3 at 854 (M.D. Fla. 1977) See also Fitzpatrick v. New York, 414 U.S. 1050 (1973) (White, J., dissenting from denial of cert.). For the positions of the courts of appeals for other circuits see United States v.Massey, supra, n. 3 at 853-54.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment of the court of appeals (Pet. App. 42-43) is not reported. The opinion of the district court (Pet. App. 44-60) is reported at 446 F. Supp. 1142.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1978. The petition for a writ of certiorari was filed on September 4, 1979, and is therefore substantially out of time under Rule 22(2) of this Court. The jurisidction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether reasonable suspicion existed justifying a stop and frisk of petitioner.

2. Whether, in the circumstances of this case, petitioner voluntarily consented to the search of his suitcase.

3. Whether the court properly admitted into evidence cocaine discovered when it fell out of petitioner's jacket.

4. Whether the evidence was sufficient to sustain petitioner's conviction.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment, to be followed by a special parole term of ten years, and was fined $5,000 (Pet. 2). The court of appeals affirmed (Pet. App. 42-43).

1. The evidence pertaining to petitioner's detention and the search of his suitcase and jacket is fully set out in the opinion of the district court (Pet. App. 44-54). Briefly, it showed that DEA agents in New York City received information that petitioner, a suspected drug trafficker, would be arriving at Kennedy International Airport on an airline ticket issued in another person's name and that he was carrying approximately $30,000 in cash. Accordingly, the agents undertook a surveillance of petitioner upon his arrival (Pet. App. 44-45). Petitioner was met by Michael Tullo and gave Tullo his baggage claim ticket. The two men then separated and pretended not to know each other. After Tullo claimed petitioner's suitcase, the two men met at Tullo's car in the airport parking lot (*id.* at 45-46). The agents approached the car, identified themselves and asked the men to get out of the vehicle. Neither man responded, and the agents observed

petitioner attempt to stuff his jacket under the car's front seat. Two of the three agents then drew their weapons and shouted at the men, after which petitioner and Tullo emerged from the car (*id.* at 46), and the agents put away their revolvers (*id.* at 54). The men were frisked for weapons and produced identification (*id.* at 46-47).

Petitioner consented to Agent Huber's request for permission to search his suitcase. In the course of removing the suitcase from the car, Agent Huber also picked up petitioner's jacket from the floor of the car; as he did so, a bag containing white powder fell from a pocket (*id.* at 47). Huber then searched the suitcase, in which he found a bag containing a white powder (later determined to be lactose) and a box labelled "Drug and Narcotics Identification Kit" (*ibid.*). Petitioner was then given *Miranda* warnings, and he agreed to accompany the agents to the DEA office. There a field test revealed that the bag that fell from petitioner's jacket contained cocaine.[1] Petitioner and Tullo were placed under arrest. Petitioner consented again to a second search of his suitcase (*id.* at 47-48). Additional narcotics paraphernalia were discovered in the suitcase, and $42,000 in cash was found hidden in petitioner's jacket (*id.* at 48).

2. The district court held that the facts observed by the agents provided them with a reasonable suspicion that petitioner was engaged in narcotics trafficking sufficient to justify the stop and frisk of petitioner (Pet. App. 50-52). After considering the totality of the circumstances, including the fact that the stop occurred in an open public area, that the agents' guns had been

[1]Testimony at trial indicated that the 40 grams of cocaine found in the jacket contained approximately 800 dosage units and was worth approximately $2,250 (Tr. 84-86).

put away, and that the request was made in a conversational tone of voice without promises or threats, the court found that petitioner voluntarily consented to the search of his suitcase (*id.* at 52-54). The court also found, however, that the consent did not authorize a search of petitioner's jacket and that the discovery of the cocaine hidden in the jacket was not inadvertent. Nevertheless, it found that the cocaine would ultimately have been discovered, because the lawful search of the suitcase led to the discovery of materials that gave rise to probable cause to believe that the car contained contraband. The court reasoned that a proper search of the car could have been conducted at that point, given its location in a public place, and the cocaine in the jacket inevitably would have been discovered (*id.* at 54-57). Accordingly, the court denied petitioner's motion to suppress (*id.* at 57). The court of appeals affirmed "substantially for the reasons" given by the district court (*id.* at 43).

ARGUMENT

At the outset, we submit that the Court should not accept this case for review because of the substantial untimeliness of the petition. The judgment of the court of appeals was entered on November 2, 1978, and the petition was therefore due for filing on December 2, 1978. It was not filed until September 4, 1979, and was therefore more than nine months out of time. With the exception of a patently insubstantial attack on the sufficiency of the evidence (see point 4, *infra*), petitioner's contentions all attack the lawfulness of the search leading to the discovery of contraband and other evidence of petitioner's guilt. Since these contentions

have no bearing upon the issue of guilt or innocence, we submit that the Court should not consider them when they are first presented in a petition that is so far out of time. To entertain them now, when the judgment of conviction has long since become final, would circumvent the policies restricting collateral attacks upon final judgments on the basis of Fourth Amendment exclusionary rule claims. See *Stone* v. *Powell*, 428 U.S. 465 (1976).

1. Petitioner contends (Pet. 17-23) that his initial detention and frisk in the airport parking lot was illegal. This contention is without merit. The DEA agents knew that petitioner was travelling under an alias, carrying a large amount of cash, and that he was already under suspicion of involvement in narcotics trafficking. Petitioner's conduct in the airport in giving his baggage claim check to Tullo and then pretending not to know him until their rendezvous in the parking lot further added to the agents' suspicion that illicit drug activities were afoot. These "specific and articulable facts" (see *Terry* v. *Ohio* 392 U.S. 1, 21 (1968)) clearly establish that the agents had a reasonable suspicion of criminal activity sufficient to justify a brief stop, as the district court found (Pet. App. 51-52). See *United States* v. *Oates*, 560 F. 2d 45, 59 (2d Cir. 1977).[2] The fact that weapons were not found during the frisk (see Pet. 20) does not suggest that the investigative stop was improper, nor did it prevent the agents from requesting petitioner's consent to search.

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[2]Petitioner suggests that this case is distinguishable from *Terry* and *Oates* because petitioner was required to place his hands on top of the car during the frisk (Pet. 20) and that this conduct, coupled with the agents' action in ordering petitioner out of the car with guns drawn, constitutes an arrest (Pet. 21). This suggestion is without foundation. The right of a policemen to stop and frisk a suspect necessarily includes the right to order the suspect to comply if he does not cooperate willingly. See *Adams* v. *Williams*, 407 U.S. 143, 147 (1972); *Terry* v. *Ohio*, *supra*, 392 U.S. at 32 (Harlan, J., concurring).

2. Petitioner concedes (Pet. 23, 27) that the district court properly considered the "totality of the circumstances" under *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973), in determining that he voluntarily consented to the search of his suitcase. However, petitioner contends (Pet. 23-30) that the district court's conclusion based on these circumstances was erroneous. Since both courts below have agreed on the factual determination that the consent was voluntarily given, further review by this Court is not warranted. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 636 (1967). Moreover, the court's finding is amply supported by the record. No threats or promises were made to induce consent, and the setting, a public parking lot, was not inherently coercive (Pet. App. 52-54). Petitioner suggests (Pet. 24, 30) that coercion must be implied because petitioner was carrying contraband and thus would not have consented to be searched voluntarily. Such a per se rule, however, would virtually eliminate the utility of consent searches by police officers, even though this Court has encouraged the use of that technique. See *Schneckloth*, *supra*, 412 U.S. at 227-228.

3. Petitioner next contends (Pet. 31-36) that the district court erred in ruling that the cocaine discovered after it fell out of petitioner's jacket was admissible under the "inevitable discovery" doctrine. Agent Huber picked up the jacket after receiving petitioner's consent to a search of his suitcase, but before conducting the search. The district court found that petitioner had not consented to a search of his jacket and that the cocaine was not admissible under the "plain view" doctrine because the act of picking up the jacket was not inadvertent (Pet. App. 54-55). The court found, however, that the evidence discovered in the suitcase search

furnished probable cause to believe that narcotics were hidden, justifying an immediate search of the car including petitioner's jacket (*id.* at 56-57). The cocaine in the jacket would inevitably have been found, and thus it was held to be admissible. *United States* v. *Jarvis*, 560 F. 2d 494 (2d Cir. 1977), cert. denied, 435 U.S. 934 (1978).

A conflict in the circuits exists concerning the validity of the inevitable discovery doctrine.[3] The Court has declined to resolve that conflict in the past,[4] and we do not believe that this case presents a suitable vehicle for addressing the issue. It is our submission that probable cause existed to search petitioner's jacket at the time the cocaine was discovered, prior to the search of his suitcase. If we are correct, there would be no occasion to decide whether the search was sustainable on inevitable discovery grounds. In addition to the other information that led the agents to suspect narcotics activity (the use of an alias, carrying over $30,000 in cash, the identification of petitioner as a suspected drug trafficker, and the suspicious conduct of petitioner and Tullo in the airport and parking lot), Agent Sears saw petitioner attempt to conceal his jacket under the front seat of the car when the agents approached the vehicle (Pet. App. 46). Sears told Agent Huber what he had observed before Huber picked up the jacket (*id.* at 47, 55). While an innocent explanation of the attempted concealment of the jacket can be imagined, it was nevertheless a highly suspicious action, which, when considered together with the other facts known to the agents, gave them probable

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[3]Compare *United States* v. *Jarvis*, *supra*, *United States ex rel. Owens* v. *Twomey*, 508 F. 2d 858 (7th Cir. 1974), and *Government of Virgin Islands* v. *Gereau*, 502 F. 2d 914, 917-928 (3d Cir. 1974), cert. denied, 420 U.S. 909 (1975) with *United States* v. *Houltin*, 525 F. 2d 943, 949 (5th Cir. 1976).

[4]See, *e.g.*, *Fitzpatrick* v. *New York*, 414 U.S. 1050 (1974).

cause to believe that weapons or contraband were present in the jacket or car, thus justifying an immediate search. *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970).

4. Petitioner finally contends (Pet. 37-41) that the evidence failed to establish that he possessed cocaine with the intent to distribute as required by 21 U.S.C. 841(a)(1), but at most showed that he possessed the cocaine solely for his personal use. This contention is without merit.

Agent Sears testified that the cocaine contained approximately 800 dosage units with a total street value of $2,250 (Tr. 84-86). This evidence of the magnitude of the resale value may alone be sufficient to sustain an inference of intent to distribute. See *United States* v. *Ramirez-Rodriquez*, 552 F. 2d 883, 885 (9th Cir. 1977); *United States* v. *Mather*, 465 F. 2d 1035, 1037 (5th Cir.), cert. denied, 409 U.S. 1085 (1972). Moreover, petitioner's possession of $42,000 in cash, the discovery of two narcotics identification kits and other narcotics implements in his suitcase, and his possession of approximately 295 grams of lactose, a cutting agent for narcotics, all support the court of appeals' holding that the evidence was sufficient (Pet. App. 43). See *United States* v. *Reese*, 561 F. 2d 894, 897 (D.C. Cir. 1977); *United States* v. *Ramirez-Rodriquez*, *supra*.[5]

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[5]Petitioner's reliance (Pet. 37) on *United States* v. *Oropeza*, 564 F. 2d 316 (9th Cir. 1977), cert. denied, 434 U.S. 1080 (1978), is misplaced. There the court concluded that no showing had been made that the heroin was within the defendant's exclusive dominion and control. 564 F. 2d at 322-323.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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